ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 595

OCB GRIEVANCE NUMBER: 24-09-900628-0404-02-11

GRIEVANT NAME: SPRANKLE, DANNY, Ph.D.

UNION: 1199

DEPARTMENT: MR/DD (MT. VERNON DEV. CENTER)

ARBITRATOR: SILVER, HOWARD

MANAGEMENT ADVOCATE: LIVENGOOD, RACHEL

2ND CHAIR: BROWN, BRUCE

UNION ADVOCATE: KEPLER, RICK

ARBITRATION DATE: APRIL 3, 1991

DECISION DATE: MAY 13, 1991

DECISION: DENIED

CONTRACT SECTIONS AND/OR ISSUES: 20 DAY SUSPENSION FOR KNOWINGLY MAKING FALSE STATEMENTS THROUGH MISREPRESENTATION OF FACTS CONCERNING A PATIENT.

HOLDING: GRIEVANT FAILED TO VISIT PERSONALLY A PATIENT HE WAS ASSIGNED FOR PSYCHOLOGICAL EVALUATION. REPORT SAID PATIENT WAS SEMI-AMBULATORY WHEN IN FACT THE PATIENT WAS COMATOSE.

ARB COST: $400.00

Howard D. Silver
Arbitrator
Columbus, Ohio

#595

In the Matter of Arbitration
Between

The State of Ohio

and

The Ohio Health Care Employees Union
District 1199, WV/KY/OH
National Union of Hospital and
Health Care Employees, SEIU, AFL-CIO

Grievant:
Danny Sprankle, Ph.D.

Case No.: 24-09-
(06-28-90)-0404-02-11

APPEARANCES

For The State of Ohio

Rachel Livengood,
Arbitration Advocate
Office of Collective Bargaining

Bruce Brown,
Labor Relations Specialist
Office of Collective Bargaining

For The Ohio Health Care Employees Union,
District 1199, WV/KY/OH
National Union of Hospital and
Health Care Employees, SEIU, AFL-CIO

Rick Kepler,
Organizer
Ohio Health Care Employees Union,
District 1199

This matter came on for hearing on April 3, 1991, within the offices of the Ohio Department of Administrative Services's Office of Collective Bargaining, 65 East State Street, Columbus, Ohio. The

parties were afforded a full and fair opportunity to present testimonial, documentary, and expert evidence, and to argue their positions. The record in this matter was closed on April 3, 1991.

ISSUE

Was the twenty day disciplinary suspension issued to Danny Sprankle on June 28, 1990, for just cause? If not, what shall the remedy be?

STATEMENT OF THE CASE

The State of Ohio and the Ohio Health Care Employees Union, District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, SEIU, AFL-CIO, (hereinafter the Union), are parties to a collective bargaining agreement in effect from June 12, 1989 through 11:59 p.m. on June 11, 1992. The Grievant, Danny Sprankle, is a member of a bargaining unit governed by this collective bargaining agreement and is employed at the Mount Vernon Developmental Center, an institution within the Ohio Department of Mental Retardation and Developmental Disabilities. Mount Vernon Developmental Center is an intermediate care facility certified to serve the mentally retarded.

Seventy to eighty percent of the residents served by the Mount Vernon Developmental Center suffer from some form of mental retardation. Cognitive levels range from the lowest, referred to as profoundly mentally retarded, to, in ascending order, severely, moderately, or mildly mentally retarded. Those who are profoundly

mentally retarded are trained in living skills such as dressing and grooming. Those in the severely mentally retarded range receive sensory stimulation, and those in the moderate to mild ranges of mental retardation are gainfully employed within sheltered workshops.

The Grievant is employed as a Psychology Assistant at the Mount Vernon Developmental Center and has served in this capacity since February, 1988. The Grievant has provided a total of fourteen years' service to the State of Ohio.

The Grievant is responsible for, among other duties, preparing individualized behavioral programs, updating these programs, conducting psychological testing, participating in inter-disciplinary treatment team meetings, preparing psychological evaluations, and updating psychological evaluations. The Grievant possesses a master's degree in counseling psychology, and, in December, 1989, secured a doctorate in counseling psychology from California University.

The Grievant reports to Mount Vernon's Chief Psychologist, a psychologist employed under contract by the Mount Vernon Developmental Center and licensed by the State of Ohio. For all professional, programmatic areas of responsibility, the Grievant reports to the Chief Psychologist. The Grievant is

administratively supervised by the Program Director of the Mount Vernon Developmental Center.[1]

Psychological evaluations prepared and updated by the Grievant are psychological profiles which describe the psychological status of an individual at a particular time. These psychological evaluations are updated annually, providing the Chief Psychologist and the Center with an evolving picture of the psychological state of the patient evaluated. Updating psychological evaluations are scheduled three weeks prior to the month in which the psychological evaluations are to be updated. Among other duties, the Grievant was responsible for preparing and/or updating psychological evaluations five to seven times per month.

During the second week of March, 1990, the Grievant was scheduled to update a psychological evaluation for a patient by the name of Lee.[2] The update of patient Lee's psychological evaluation for 1990 required the Grievant to do four things. First, the Grievant was to talk with direct care staff, including medical staff, who had had over the past year regular and continuing contact with patient Lee. These discussions were to inform the Grievant of what these staff members had observed. Second, the

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[1] At the time of hearing, the Program Director, the adminstrative supervisor of the Grievant, was also serving as the Acting Superintendent of the Mount Vernon Developmental Center. This dual role was assumed March 20, 1991. It is presumed that the administrative supervision of the Grievant's position emanates most directly from the Program Director position and would not normally originate from the Superintendent of this facility.

[2] In deference to the privacy rights enjoyed by the patient at issue in this matter, a pseudonym is used.

Grievant was to review all significant records describing patient Lee's previous year at the Center. Third, the Grievant was to meet with the patient.[3] Fourth, an updated evaluation was to be written and signed.

In preparing the 1990 updated psychological evaluation of patient Lee, the Grievant traveled to the living unit to which patient Lee was assigned. While this living unit contained the records of patient Lee, the Grievant learned that patient Lee had not resided within this living unit, living unit six, for at least the previous six months. The Grievant was informed that patient Lee was located in subunit eight, a unit which provides highly skilled nursing care.

The Grievant talked with the direct care staff on living unit six, reviewed records kept on patient Lee, reviewed previous psychological evaluations of patient Lee prepared in 1988 and 1989, and also reviewed an adapted behavior scale survey which is presented in a form suggested by the American Association on Mental Deficiency (AAMD). This survey had been prepared by a staff psychologist at the Mount Vernon Developmental Center on April 16,

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[3] The Grievant testified at hearing that meeting patient Lee face to face, from a psychological point of view, would have been of no value. This statement is rejected by the arbitrator. Based on the testimony of the Program Director and documents within the record of this matter, the arbitrator concludes that it was professionally and programmatically required that in updating the psychological evaluation of this patient the Grievant personally meet with the patient. The arbitrator does not find that clinical psychological evaluation procedures of the type in question permit the evaluation of a patient without observing the patient personally.

1988. This survey had been filled out to assess the then functioning level of patient Lee.

The Grievant did not travel to subunit eight. At no time prior to preparing the 1990 psychological evaluation update for patient Lee did the Grievant in any way observe patient Lee.

On April 16, 1990, a previously scheduled interdisciplinary team meeting was convened to consider, among other patients, patient Lee. Attending this interdisciplinary team meeting were the Grievant and eleven other staff members of the Mount Vernon Developmental Center, including a program coordinator who is a Qualified Mental Retardation Professional (QMRP), a licensed social worker, a therapeutic program worker, and an audiologist. The Grievant attended in his official capacity as the Department of Psychology's representative to consider modifications to the individualized treatment plan fashioned by the Center for patient Lee. The updating of the psychological evaluation by the Grievant was intended to provide to the participants at this meeting the information necessary upon which to base decisions about revisions to patient Lee's treatment plan. Other team members were to provide descriptions of other aspects of Mr. Lee's residence at the Center in order to reach conclusions about how to improve patient Lee's treatment plan.

The Grievant appeared for the interdisciplinary team meeting scheduled to address patient Lee, and while participating in this meeting prepared the psychological evaluation update of Mr. Lee for 1990. This update appears in the record as Joint Exhibit 12.

The psychological evaluation update prepared by the Grievant at the interdisciplinary team meeting on April 16, 1990, reflects patient Lee's birthday; chronological age; place of residence, including assigned living unit; and the last date upon which patient Lee had been psychologically tested, April 18, 1988.

In the background information provided by the Grievant within his April 16, 1990 update of patient Lee, patient Lee is described as an ambulatory, selectively verbal, sixty year old male; probably suffering from Down's Syndrome, progressive arthritis, degenerative disc disease, and a variety of other severe medical problems, especially problems associated with the spine, the feet, and the central nervous system. Patient Lee is also described within this background information as hearing within conversational limits and having functional vision in only the right eye.

Current status within the psychological evaluation update of patient Lee prepared by the Grievant on April 16, 1990, reads, in pertinent part, as follows:

> From past and present reports, as well as current observation, and due in part to Lee's passive uncooperativeness at the time of latest psychological evaluation (4-18-88) formalized testing could not be obtained. It remains apparent from staff reports and observations that he continues to function at or below a II year level of cognitive development, reflective of profound mental deficits.
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> The AAMD adaptive behavior scale was updated by report 4-16-90 with overall capabilities appearing to decline in the past year. In the domain of independent functioning, Lee remains totally dependent on

staff assistance for eating and drinking and still tends to eat rather slowly at times. He may at times succeed in feeding himself if this involves finger foods. Skills in the area of self-care with toileting require assistance. He frequently is incontinent during the day. Staff still continues to provide care during and after he uses the toilet and continues to attempt to take him in advance of need. Concurrent with past reports, he still continues to display an intense fear of water. This fear is demonstrated during bathing, shampooing, and even washing his face with a washcloth. He stills remains especially reactive when water is sprayed in his direction. Some resistance to oral hygiene is demonstrated. Staff still continue to provide total assistance during dressing, undressing activity.

With regard to Sensorimotor Development, Lee ambulates with a stoop-forward position and may walk either with staff holding his two hands as they walk backwards in front of him or with his hands on the hips of staff as they walk forward. He maintains difficulty in ambulation and with several other activities due to his vision difficulties. His hearing appears to be adequate for his needs and he responds to voices.

In the area of communication skills, staff currently indicates Lee may occasionally verbalize short phrases when upset or frustrated although he seems to only have a vocabulary of several words. He may indicate perceived wants/needs by vocalizations or gestures. Receptively, he still continues to require both verbal and psychical prompts to follow even one step routine requests.

To date Lee exhibits a little or no skills in the area of economic, vocational or domestic activity, numbers and time concepts, or responsibility.

With respect to self direction, Lee still does not initiate functional activities. He still may ambulate very short distances but is totally dependent on staff or assistance and otherwise maintains a delimiting sense of purposeful activity.

> In the domain of socialization, Lee still does not initiate much spontaneous interaction with others. He appears rather passive during activities.
>
> Behaviorally, he still continues to exhibit some tactile defensiveness, particularly when touched in the face, head (shampoo), or on the bottom (being bathed, etc.). Lee also demonstrates at times active resistiveness with structured programming in his behalf. Little or no stereotypic behavior, i.e., hand waving are consistently displayed. He remains rather passive.

The psychological evaluation update prepared by the Grievant was signed by the Chief Psychologist of the Mount Vernon Developmental Center and thus became the official psychological evaluation update for patient Lee for calendar year 1990.

It is undisputed that at the time the Grievant completed the psychological evaluation update of patient Lee in April, 1990, patient Lee was dying.[4] According to a medical evaluation conducted on patient Lee by a staff physician at the Mount Vernon Developmental Center on April 16, 1990, Joint Exhibit 13, patient Lee was being fed by means of a tube inserted into his stomach, had been nonambulatory since May, 1989, was nonverbal, was assisted in his breathing by means of a tube inserted into his throat, and had been, for months, existing in a semicomatose state. None of these circumstances concerning patient Lee were reported in the psychological evaluation update prepared by the Grievant on April 16, 1990. The absence of these significant physical conditions

[4] At the time of hearing, patient Lee was deceased.

from the psychological evaluation update prepared by the Grievant was not a purposeful omission in terms of what was known by the Grievant on April 16, 1990, but rather was caused by an incomplete evaluation process during which papers and staff were reviewed but the patient was not observed. Because the Grievant did not travel to subunit eight and view patient Lee with his own eyes, the Grievant reported in patient Lee's 1990 psychological evaluation update that the patient was able to feed himself, was ambulatory, and was capable of some verbalization.

The incorrect descriptions within patient Lee's psychological evaluation update for 1990 become particularly curious when the minutes of the interdisciplinary team meeting of April 16, 1990 concerning patient Lee are reviewed. The minutes of this team meeting reflect a functioning tracheostomy with respirator; a functioning G-tube for feeding; a nonambulatory, nonverbal, and incontinent patient; and a degrading of brain waves reflecting cerebral atrophy. Considering what was presented at the interdisciplinary team meeting of April 16, 1990, the Grievant's description of patient Lee cannot have been based on information received at this meeting.

Joint Exhibits 10 and 11 are the psychological evaluation updates for patient Lee prepared in April, 1988 and April, 1989, respectively. The 1988 evaluation bears the signature of the supervising psychologist at the Mount Vernon Developmental Center; the 1989 psychological evaluation update also bears the signature of the supervising psychologist at the Center. Both the 1988 and

1989 psychological evaluation updates of patient Lee reviewed by the Grievant prior to his preparation of the 1990 psychological evaluation update describe patient Lee as ambulatory, selectively verbal, and capable of feeding himself if eating finger foods. The evidence presented to the record in this matter persuades the arbitrator that the written description of patient Lee provided by the Grievant on April 16, 1990, was based primarily on previous psychological evaluations done on patient Lee. The arbitrator is further persuaded that the 1990 evaluation is so significantly mistaken that the psychological evaluation update prepared by the Grievant on April 16, 1990, including a subsequent edited version of this psychological evaluation prepared by the Grievant, is so inadequate for the purpose to which the psychological update was to be put as to constitute an incident of neglect of duty.

DISCUSSION

The Grievant was not suspended for twenty days because of the poor quality of the patient Lee psychological evaluation update prepared by the Grievant. The suspension issued to the Grievant alleges that the Grievant knowingly made false statements through misrepresentation of facts concerning patient Lee.

The arbitrator is persuaded that the psychological evaluation update prepared by the Grievant as to patient Lee on April 16, 1990, intends to raise within the reader of this report the inference that patient Lee was visited personally by the author of

this report and observed. The first line of the narrative under background information on the 1990 psychological update begins, "On appearance, Lee is presented..." The first sentence appearing under current status on this update reads, "From past and present reports, as well as current observations..." These are words intended to inform the reader of a personal observation of the patient described. As personal observation is a requirement of this evaluation procedure, a statement of such personal observation is significant to confirmation of the implementation of a valid evaluative procedure.

The arbitrator is persuaded that the Grievant utilized a previous year's report to describe a patient he had not observed. Such an evaluation may have some value in some context, but in the case of such an evaluation the resulting report should describe the circumstances under which the patient is evaluated. To affirmatively state that an evaluation is based upon "current observation", without such an observation, is to mislead and mislead purposefully. The clinical inadequacy revealed by the 1990 patient Lee update is significant. The camouflage of such professional inadequacy served to exacerbate the detrimental effects resulting from this flawed evaluation.

At hearing, the Grievant argued that among the records on patient Lee located on living unit six was information supporting the descriptions appearing within the 1990 update prepared by the Grievant. Even assuming this to have been the case, it only emphasizes the importance of a personal observation so as to be

able to distinguish between what appears to be real from records from what is truly the condition of the patient under review. The failure of the Grievant to extend the minimal effort to walk to subunit eight and observe personally the patient he was evaluating represents neglect of duty. Written statements issued by the Grievant suggesting that such an effort had been expended in performing the evaluation constitute purposeful false statements intended to mask this omission. Issuing a false psychological report that is known to be false constitutes just cause for the imposition of discipline. Article 8, Section 8.01 of the collective bargaining agreement between the parties authorizes the imposition of discipline for just cause.

The Union has raised the issue of disparate treatment in terms of the severity of disciplinary action imposed upon the Grievant. The Union points to a prior set of circumstances wherein a physician employed by the Mount Vernon Developmental Center failed to physically examine patients and issued reports as if he had. An investigation was conducted but it was determined by the Employer that there was insufficient evidence upon which to impose disciplinary action. The Union contends that as the physician escaped disciplinary action for misconduct similar to that which the Grievant is alleged to have participated in, even if the Grievant is guilty of this misconduct he should not be disciplined more severely than the physician. The Union points out that in the case of the physician a suspension of ten days was recommended by a preliminary reviewing committee.

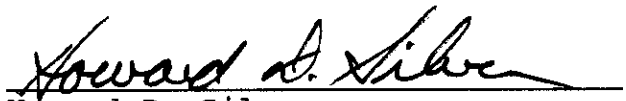
A claim of disparate treatment does not address the issue of just cause for disciplinary action. Disparate treatment addresses the severity of discipline meted out when disciplinary action is supported by just cause. In the presence of just cause for disciplinary action, the burden of persuasion falls to the Union to present sufficient evidence showing that the grievant who has been disciplined has been disciplined more severely in a manner that is arbitrarily different than the discipline meted out previously for similar misconduct. The case presented by the Union as to the physician who failed to provide the required physical examinations is a case that did not result in disciplinary action. It therefore cannot be known what disciplinary action would have been meted out had the physician been disciplined. The fact that at one point in that proceeding a committee recommended a ten day suspension is not evidence of employer imposed disparate disciplinary treatment. The stated reason for the lack of disciplinary action in the previous case was insufficient evidence to proceed. That is not the case in this matter.

The arbitrator is not persuaded that evidence has been presented reflecting that a twenty day suspension imposed for the kind of misconduct proven in this proceeding is disparate and disproportionate to disciplinary action previously meted out by the Employer for similar misconduct. The arbitrator does not find that the disciplinary action imposed as a result of the misconduct of the Grievant is arbitrary, discriminatory, or disproportionate to the offense charged and proven.

The Grievant's misconduct proven in this matter, misconduct associated with willful false statements issued to the Employer, supports a finding of just cause for disciplinary action and the seriousness of this proven misconduct supports a suspension of twenty days.

AWARD

The grievance is denied.



Howard D. Silver
Arbitrator

May 13, 1991
Columbus, Ohio